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90-1186
No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

JOHNSON GAS APPLIANCE COMPANY,
Petitioner,

v.

VE HOLDING CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Was it proper for the Court of Appeals for the Federal Circuit to disregard the decisions of the United States Supreme Court in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957) and *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942) and rule that the definition of corporate residence in amended 28 U.S.C. § 1391(c), the general venue statute, applies to 28 U.S.C. § 1400(b), the special patent venue statute?

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PARTIES

VE Holding Corporation is affiliated with United Trans Western Inc. California Pellet Mill Co. is a party to the district court proceeding.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto as Appendix A. The opinions of the Northern District of California appear in the Appendix hereto as Appendices B and C. The House Report on amended 1391(c) appears in the Appendix as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on October 24, 1990. This Petition for Certiorari was filed within Ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1391(c)(1948), entitled "Venue generally."

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

2. Amended 28 U.S.C. § 1391(c)(1988) (effective February 17, 1989) entitled "Venue generally."

> For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

3. 28 U.S.C. § 1400(b) (1948) entitled "Patents and copyrights."

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

STATEMENT OF THE CASE

28 U.S.C. § 1391(c) was amended pursuant to the Court Reform and Access to Justice Act of 1988 to eliminate an ambiguity as to corporate venue in multidistrict states. The question here is whether the definition of corporate residence as amended in the general venue statute (i.e., the judicial district in which a corporation is subject to personal jurisdiction at the time the action is commenced) applies to the term "resides" in 28 U.S.C. § 1400(b), the special patent venue statute. In *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), this Court held that 28 U.S.C. 1391(c) (prior to amendment) did *not* apply to the special patent venue statute.

VE filed two actions against Johnson Gas, an Iowa corporation, in the United States District Court for the Northern District of California. In each action, VE claimed that Johnson Gas had induced and contributed to the infringement of certain patents assigned to VE. Jurisdiction was proper in each case under 28 U.S.C. § 1338(a).[1]

VE's second action was filed against Johnson Gas on November 3, 1989, after the effective date of § 1391(c). As a basis for proper venue, VE asserted that Johnson Gas was subject to personal jurisdiction in the Northern District of California and

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[1] The first action was commenced prior to the effective date of amended § 1391(c). That action was dismissed for improper venue under Fed.R.Civ.P. 12(b)(3) because Johnson Gas neither resided nor had a regular and established place of business in the Northern District of California. The dismissal of the first action was affirmed by the Federal Circuit and is not at issue here.

therefore "resided" there under amended § 1391(c) and § 1400(b).

Johnson Gas moved to dismiss the Complaint in the second action pursuant to Fed.R.Civ.P. 12(b)(3) for lack of venue under § 1400(b), the special patent venue statute. Johnson Gas asserted that the Supreme Court in *Fourco Glass v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957) addressed the issue of whether the definition of corporate residence in the general venue statute, § 1391(c), applied to § 1400(b), and specifically held that it did not. The district court agreed, and Johnson Gas' motion was granted. *VE Holding Corp. v. California Pellet Mill Co. and Johnson Gas Appliance Co.*, No. C89-3856, Slip. Op. at Appendix, p. A-24. The district court also noted that defining the term "resides" of § 1400(b) in accordance with the corporate residence definition of § 1391(c) would render the second clause of the statute superfluous and destroy its intended effect:

> An additional reason for finding that Congress did not intend to modify Section 1400(b) is that expanding the meaning of 'resides' in Section 1400(b) would render the second clause superfluous; any defendant "doing business" in a judicial district would be subject to personal jurisdiction .... The only way all of Section 1400(b) can be given meaning is by maintaining its exclusivity in patent infringement actions.

Id. at A-23.

The Court of Appeals for the Federal Circuit reversed, giving two reasons for refusing to follow the holding of *Fourco Glass*: 1) the decision of the Supreme Court in *Brunette Machine Works v. Kockum Industries*, 406 U.S. 428 (1972) modified the Court's holding in *Fourco Glass* that § 1400(b) could not be supplemented by the general venue statute; and 2) the Supreme Court in *Fourco Glass* did not consider whether the definition of corporate residence in *amended* § 1391(c) applied to § 1400(b). *See VE Holding Corp. v. Johnson Gas Appliance Co.*, Nos. 90-1270, 90-1274, Slip. Op. at Appendix, pp. A-8—A-9. The Federal Circuit then found that the plain meaning of amended § 1391(c)

required that its definition of corporate residence be applied to § 1400(b). *Id.* at A-9.

The issue now before this Court on timely Writ of Certiorari is simple: is *Fourco Glass* still the law or has it been superseded by the Federal Circuit decision which is the subject of this petition?

ARGUMENT

The question presented by this petition is an important one. The Federal Circuit has, in essence, overruled this Court's decisions in *Fourco Glass* and *Stonite Products*. Under the doctrine of stare decisis, the Federal Circuit owes obedience to the *Fourco Glass* and *Stonite Products* decisions until this Court sees fit to reexamine them. *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970); *See* 1B(1) J. Moore, J. Lucas, T. Currier, *Moore's Federal Practice* ¶ 0.402[1], (2d ed. 1988). This Court alone must decide whether *Fourco Glass* and *Stonite Products* are still binding precedent in light of the recent amendment to 28 U.S.C. § 1391(c)—that decision is not one for the Federal Circuit.

A. Fourco Glass and Stonite Products are Black Letter Law

The identical issue presented to the district court and Federal Circuit was before this Court in *Fourco Glass*: whether the corporate residence definition of § 1391(c) applied to the "resides" provision of § 1400(b). This Court held that the corporate residence definition of § 1391(c) did not supplement the "resides" provision of § 1400(b):

> We think it is clear that § 1391(c) is a general venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to *all* defendants in a particular type of action, i.e., patent infringement actions. In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . .' Specific terms prevail over the general in the same or another statute which otherwise might be controlling . . . . We hold that 28 U.S.C. § 1400(b) is the sole and

> exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c). (citations omitted)

Fourco Glass, 353 U.S. at 228-29.

The Supreme Court had earlier come to the same conclusion in *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), which preceded *Fourco Glass*.[2] The Court in *Stonite Products*, using the precise logic later adopted by the *Fourco Glass* Court, held that the specific patent venue statute, 28 U.S.C. § 109 (current version at 28 U.S.C. § 1400(b)), was not supplemented by 28 U.S.C. § 113 (current version at 28 U.S.C. § 1392(a)). *Stonite Products*, 315 U.S. at 567. The *Stonite Products* Court held that Congress intended the special patent venue statute to be exclusive and controlling in patent infringement cases. *Id.*

Thus, the Supreme Court has twice set forth the black letter rule: § 1400(b) is the sole and exclusive provision governing corporate patent venue, and it is not to be supplemented by § 1391(c).

B. The Federal Circuit's Rejection of Fourco Glass is Illogical and Ill-Conceived

The application of the corporate residence definition of § 1391(c) violates the intended purpose of § 1400(b), as made clear in the *Stonite Products* and *Fourco Glass* decisions. The district court appropriately noted that if the personal jurisdiction standard of § 1391(c) were applied to § 1400(b), the second portion of the statute would be superfluous. The issues of "acts of infringement" and "regular and established place of business" would never be addressed in the vast majority of patent cases, which involve corporate defendants. That certainly was not the intent of Congress in drafting 1400(b), as this Court has noted explicitly. *Fourco Glass*, 323 U.S. at 226-27; *Stonite Products*, 315 U.S. at 563-67. The intent of Congress is the touchstone of

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[2] This case presents an interesting parallel to *Fourco Glass*, where this Court rejected the argument that *Stonite Products* was no longer the law because of an amendment to the general corporate venue statute.

statutory interpretation when considering whether a specific statute prevails over a general statute. *Redzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

Further, there is simply no evidence that Congress intended to either dispose of *Fourco Glass* or provide an awkward interpretation of § 1400(b). Rather, in amending § 1391(c), Congress simply intended to *narrow* § 1391(c), the general venue statute, to districts within multidistrict states in which a corporation was actually doing business. 1988 U.S. Code, Cong. & Admin. News 5982, 6031, Appendix, pp. A-34 - A-35. *See also* Dist. Ct. Slip. Op. at A-22 - A-23. Stare decisis weighs heavily in the area of statutory construction. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Absent clear and unequivocal congressional intent to amend § 1400(b), *Fourco Glass* and § 1400(b) should remain intact. No evidence exists of any such contrary intent.

Likewise, the disposal of § 1400(b) and *Fourco Glass* by the recent amendment to 1391(c) simply does not make sense. The purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place for trial. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 183-84 (1979). That policy would be wholly frustrated if the amended definition of corporate residence in amended 1391(c) were applied to § 1400(b). Again, that certainly cannot be construed to be the intent of Congress in light of the clearly stated Congressional purpose behind the § 1391(c) amendment. Dist. Ct. Slip. Op. at A-22 - A-23.

C. The Federal Circuit Erred as a Matter of Law in Disregarding Fourco Glass

To escape *Fourco Glass*, the Federal Circuit found that the Supreme Court supplemented § 1400(b) with a general venue statute, § 1391(d), in *Brunette Machine Works v. Kockum Industries*, 406 U.S. 706 (1972). However, the Court's ruling in *Brunette* did nothing of the sort. Rather, *Brunette* simply held that § 1391(d) was the specific statute to be applied to suits against aliens. The *Brunette* Court stated "For § 1391(d) is properly regarded, not as a venue restriction at all, but rather a declaration of the long-established rule that suits against aliens are wholly

outside the operation of all the federal venue laws, general and special." *Id.* at 714. The Federal Circuit's reliance on the *Brunette* decision was error and provided no reason to not apply stare decisis to the *Fourco Glass* decision.

Likewise, the Federal Circuit erred in distinguishing *Fourco Glass* on the grounds that it did not address the issue of *amended* § 1391(c). The Federal Circuit used this logic as its stepping stone to the application of the plain meaning rule. This was legal error plain and simple. *Fourco Glass* addressed the issue of supplementing § 1400(b) with the corporate residence definition of § 1391(c) and held that "however inclusive" the language of § 1391(c), it would *not* apply to § 1400(b). *Fourco Glass,* 353 U.S. at 228.

The Federal Circuit also missed the point in finding that the application of the corporate residence definition of *amended* 1391(c) to § 1400(b) would not conflict with § 1400(b). Apparently, the logic was that § 1400(b) would still be applicable to defendants such as individuals and partnerships, but not corporations. That position makes the statute essentially meaningless—almost all patent actions involve corporate defendants. Moreover, that interpretation specifically ignores the intent of Congress to apply 1400(b) to corporations, as spelled out in the *Stonite Products* and *Fourco Glass* decisions.

In sum, the Federal Circuit had no sound reason for not following this Court's decisions in *Fourco Glass* and *Stonite Products* and its decision should be overruled.

CONCLUSION

The Federal Circuit erred in refusing to apply this Court's *Fourco Glass* and *Stonite Products* decisions, and by holding that a minor change to § 1391(c) for another purpose eviscerated § 1400(b), the patent venue statute. Accordingly, the petition for writ of certiorari should be granted.

Dated: January 22, 1991

Respectfully submitted,

By GEORGE M. SCHWAB
George M. Schwab

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-1270, -1274

VE HOLDING CORPORATION,
Plaintiff-Appellant,
v.
JOHNSON GAS APPLIANCE COMPANY,
Defendant-Appellee.

DECIDED: October 24, 1990

Before ARCHER, PLAGER AND CLEVENGER, *Circuit Judges.*

PLAGER, *Circuit Judge.*

For almost one hundred years, a specific statutory provision, currently section 1400(b) of chapter 87, title 28, U.S. Code, has set forth the bases for establishing venue in patent infringement actions. Where the defendant 'resides' is one of those bases. Supreme Court decisions, with one exception, have maintained that that provision is unaffected by other statutory provisions governing venue.

In 1988 Congress adopted a new definition of 'reside' as it applies to venue for corporate defendants. This case requires us to decide whether, by that amendment to § 1391(c) of chapter 87, Congress meant to apply that definition to the term as it is used in § 1400(b), and thus change this long-standing interpretation of the patent venue statute. The district courts addressing this question have arrived at conflicting results.[1]

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[1] *See Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 734 F.Supp. 911, 14 USPQ2d 1909 (N.D. Cal. 1990) (amended § 1391(c) supplements § 1400(b)); *Joslyn Mfg. Co. v. Amerace Corp.*, 729 F.Supp. 1219, 14 USPQ2d 1223 (N.D. Ill. 1990) (§ 1400(b) remains unaffected); *Century Wrecker Corp. v. Vulcan Equip. Co.*, 733 F.Supp. 1170, 13 USPQ2d 1715 (E.D. Tenn. 1989) (amended § 1391(c) supplements

This is a case of first impression. It comes to us in the form of consolidated appeals from two judgments of the United States District Court for the Northern District of California ("District Court"), No. C89-0209 SC (May 19, 1989) (*"VE Holding I"* — Appeal 90-1270) and No. C89-3856 SC (Feb. 9, 1990) (*"VE Holding II"* — Appeal 90-1274), dismissing plaintiff/appellant's action against appellee for improper venue. We hold that Congress by its 1988 amendment of 28 U.S.C. § 1391(c) meant what it said; the meaning of the term 'resides' in § 1400(b) has changed. We therefore reverse the judgment in *VE Holding II* (Appeal 90-1274) and remand the case for further proceedings consistent with this opinion.[2]

I.

Plaintiff/appellant, VE Holding Corporation ("VE"), is the holder of U.S. Patents Nos. 4,667,408, 4,704,804, and 4,731,938 ("the VE patents"). Plaintiff filed suit in the District Court against, in *VE Holding I*, California Pellet Mill Company ("California Pellet") and Johnson Gas Appliance Company ("Johnson"), and in *VE Holding II*, Johnson alone, alleging direct and contributory infringement of and inducement to infringe the VE patents. In both cases Johnson moved to dismiss for improper venue, on the grounds that it is an Iowa corporation with no regular and established place of business in the Northern District of California.

The District Court found that Johnson as an Iowa corporation did not 'reside' in California, as that term has been construed in § 1400(b), and, in addition, that Johnson on the facts did not have a regular and established place of business in the Northern

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§ 1400(b)); *Doelcher Prods., Inc. v. Hydrofoil Int'l. Inc.*, 14 USPQ2d 1067 (D. Md. 1989) (§ 1400(b) remains unaffected).

[2]Since the 1988 amendments were not effective when the complaint in *VE Holding I* was filed, the then applicable law required dismissal for want of venue, as the District Court held. We therefore affirm the judgment of the District Court in Appeal 90-1270.

District of California, as the venue statute required.[3] The District Court rejected VE's argument that the 1988 amendment to § 1391(c) of the venue chapter redefined the term 'reside' as it is used in § 1400(b). The District Court therefore held that venue did not lie in the Northern District of California with respect to Johnson.[4] Plaintiff filed timely notice of appeal to this court.[5]

II.

Venue, which connotes locality, serves the purpose of protecting a defendant from the inconvenience of having to defend an action in a trial court that is either remote from the defendant's residence or from the place where the acts underlying the controversy occurred. 1A(2) J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice* ¶ 0.340 (2d ed. 1990). The venue statutes achieve this by limiting a plaintiff's

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[3]In light of our holding in Appeal 90-1274 that venue lies in the District Court under the residence test of § 1400(b), we need not consider whether the other statutory bases for venue apply.

[4]Because *VE Holding I* was filed on January 24, 1989, prior to the effective date of the 1988 amendment, the issue of the effect of the 1988 amendment was not properly before the District Court. Therefore, on October 26, 1989, VE refiled the suit against Johnson (*VE Holding II*), which was consolidated with *VE Holding I*. Johnson again filed a motion to dismiss for improper venue. The District Court again granted Johnson's motion, on the same grounds. This time the issue was properly before the District Court. For the reasons explained above, *VE Holding I* (Appeal 90-1270) is affirmed. *See supra* note 2.

[5]As noted, in *VE Holding I* there were two defendants, appellee Johnson and California Pellet. The District Court, pursuant to Rule 54(b), directed entry of a final judgment as to Johnson Gas, making that determination immediately appealable. In *VE Holding II*, Johnson Gas was the sole defendant. The dismisal by the District Court for want of venue was therefore a final judgment in the case. Both cases were appealed; a joint motion to consolidate the appeals was granted. California Pellet's motion to withdraw from the appeal, on consent, was granted.

choice of forum to only certain courts from among all those which might otherwise acquire personal jurisdiction over the defendant.[6]

The Judiciary Act of 1789 included a general venue provision governing all civil suits cognizable in the federal courts. Judiciary Act of 1789, ch.20, § II, I Stat. 78. This Act was held applicable to patent infringement suits in *Chaffee v. Hayward*, 61 U.S. (20 How.) 208, 216 (1857). The general venue statutes are found today in chapter 87, title 28, U.S. Code.

The first statute specifically addressed to venue in patent infringement suits was enacted a century later, in 1897. Act of March 3, 1897, ch. 395, 29 Stat. 695. The current version of this Act is found in § 1400(b) of the venue chapter (chapter 87 of title 28). Section 1400(b), which has been in its present form since 1948, reads:

> (b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Act of June 25, 1948, ch. 646, 62 Stat. 936.

Patent law is not alone in having a particular venue statute that deffers in its terms from the general venue provisions applicable to other federal causes of action. For example, in addition to sections dealing with venue in diversity jurisdiction cases,[7] federal question cases,[8] and venue regarding suits against aliens,[9] the venue chapter contains provisions for suits in certain cases by a national banking association,[10] for suits for collection of internal revenue taxes,[11] for suits regarding Interstate Commerce Commission

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[6]This discussion assumes of course that the court has subject matter jurisdiction over the cause, a question not at issue in this case.

[7]28 U.S.C. § 1391(a)

[8]28 U.S.C. § 1391(b)

[9]28 U.S.C. § 1391(d)

[10]28 U.S.C. § 1394

[11]28 U.S.C. § 1396

orders,[12] and for stockholder's derivative actions.[13] Other particular venue provisions appear elsewhere in the Code, accompanying the substantive law provisions governing specific areas. *See, e.g.*, 46 U.S.C. § 688 applying to Jones Act cases; 15 U.S.C. §§ 15, 22 applying to antitrust actions.

In all of these areas in which particular venue statutes apply, the question can be raised — to what extent do the general venue provisions of chapter 87 supplement what is contained in the special provision, whether that special provision is contained in chapter 87 of elsewhere. The issue appears to arise infrequently; the few decisions suggest that the answer depends very much on the precise language of the relevant statutes along with, in appropriate cases, other evidence of Congressional intent. Facially, there is little consistency from area to area.

In the Jones Act and antitrust areas, for example, the courts have read the general venue provisions into the special provisions. *See Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966) (Jones Act); *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989) (antitrust); *Adams Dairy Co. v. National Dairy Prods. Corp.*, 293 F.Supp. 1135 (W.D. Mo. 1968) (antitrust). In applying these particular venue provisions, courts have concluded that the Congressional intent was to 'enlarge' the plaintiff's choice of forum by reading the special venue provisions as supplemental to, rather than superseding, the general venue provisions. *See Pure Oil*, 384 U.S. at 206 ("there is nothing to show a congressional purpose negativing the more natural reading of the two [Jones Act and general] venue sections together"); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 855 (11th Cir. 1988) ("In a federal antitrust case, venue may be established under [15 U.S.C. § 15 or § 22], or the general federal venue statute, 28 U.S.C. § 1391(b).")

In the patent field, that has not been the case. The Supreme Court in 1942 and again in 1957 took a restrictive view of venue in patent infringement cases, holding in effect that the meaning of

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[12]28 U.S.C. § 1398

[13]28 U.S.C. § 1401

the terms used in § 1400(b) was not to be altered or supplemented by other provisions found in the venue statutes. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957); *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942); *followed in In re Cordis*, 769 F.2d 733, 226 USPQ 784 (Fed. Cir. 1985). *But see, Brunette Mach. Works. Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972), discussed below).

As written, section 1400(b) dictates that venue is proper when either of two tests is satisfied: (1) the defendant resides in the judicial district, or (2) the defendant has committed acts of infringement and has a regular and established place of business in the judicial district. The Supreme Court in *Fourco* confirmed that for defendants that are corporations, 'resides' meant the state of incorporation only. Section 1391(c), the general venue section which addressed the question of where corporations may be sued, and which contained language about the residence of corporations, did not supplement the specific provisions of § 1400(b). *Id.* at 229.

At the time the Supreme Court's decision in *Fourco* was handed down, § 1391(c) consisted of one sentence which read:

> (c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

The first clause (up to the comma) established venue for corporations. The second clause either was surplusage since the term 'residence' was not used in the first clause as one of the bases for venue or, if it applied to plaintiffs as well as defendants (*see* discussion and cases cited in *Robert E. Lee & Co. v. Veatch*, 195 F.Supp. 528, 530 (W.D.S.C.), *rev'd*, 301 F.2d 434 (4th Cir. 1961)), was at best confusing. In addition to this difficulty, problems with this subsection arose regarding venue in multidistrict states. Annotation, *Corporatio, Incorporated or Licensed to Do Business in Multidistrict State, as Subject, Under 28 U.S.C.S. § 1391(c), to Suit in Every District in State or Only in Districts in Which It Does Business*, 14 A.L.R. Fed. 938 (1989).

In response to pressure from the bar and the courts, in 1988 Congress amended § 1391(c).[14] The former one sentence subsection now consists of two sentences. The new second sentence of subsection (c) applies when a defendant corporation is amenable to federal jurisdiction in a state having several judicial districts. It prescribes which of them shall be the proper venue, and is not at issue in this case.

The new first sentence of amended § 1391(c) reads:

> (c) *For purposes of venue under this chapter,* a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.

28 U.S.C. § 1391(c) (1988) (emphasis added).[15] The phrase "this chapter" refers to chapter 87 of title 28, which encompasses §§ 1391-1412, and thus includes § 1400(b). On its face, § 1391(c) clearly applies to § 1400(b), and thus redefines the meaning of the term 'resides' in that section.

However, one familiar with the judicial history of § 1400(b) may be tempted to disregard the clear language of § 1391(c) and maintain the independence of that section from § 1400(b). The lack of express legislative history indicating that the 1988 amendment of § 1391(c) was intended to change the scope of venue in patent infringement cases, and the fact that such a conclusion would seem to fly in the face of thirty years of Supreme Court law, strengthens the temptation.

In *Fourco,* the Supreme Court addressed the same question presently before this court. "The question is . . . whether § 1391(c) supplements § 1400(b), or, in other words, whether the latter is complete, independent and alone in controlling in its sphere as was held in *Stonite*, or is, in some measure, dependent

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[14]Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. X, § 1013(a), 102 Stat. 4642, 4669 (1988).

[15]The 1988 amendment took effect on February 17, 1989, i.e., 90 days after enactment of the amendment. *See* Judicial Improvements and Access to Justice Act.

for its force upon the former." *Fourco*, 353 U.S. at 228. In deciding that it was not so intended, the Supreme Court stated:

> We think it is clear that § 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to *all* defendants in a particular type of actions, *i.e.*, patent infringement actions. In these circumstances the law is settled that "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208." *MacEvoy Co. v. United States*, 322 U.S. 102, 107.

Fourco, 353 U.S. at 228-29 (emphasis in original).

III.

The Supreme Court's decision in *Fourco* is generally viewed as holding that § 1400(b) is the 'exclusive' venue statute in patent infringement actions. Thus it is sometimes said that, since *Fourco*, the only way to change the way that venue in patent infringement actions is determined is to change § 1400(b). This argument fails, however, because the Supreme Court, in *Brunette*, 406 U.S. 706, refused to impose such a disablement upon the Congress' ability to enact or amend legislation. The issue in *Brunette* was whether § 1400(b) governed venue in a patent suit involving a foreign corporation, or whether the general venue provision applicable to aliens, 28 U.S.C. § 1391(d), governed. The Court held § 1391(d) applied, and that § 1400(b) was supplemented by the provision governing suits against aliens. *Fourco* and *Stonite* were distinguished.

The specific question in *Fourco* was whether the statutory language previously enacted by the Congress as § 1391(c) supported a conclusion that Congress intended to have §§ 1391(c) and 1400(b) read together. On the basis of the nonspecific language of § 1391(c) and prior history as the Court read it, the Court concluded the answer was no.

Section 1391(c) as it was in *Fourco* is no longer. We now have exact and classic language of incorporation: "For purposes of venue under this chapter . . ." Congress could readily have added "except for section 1400(b)," if that exception, which we can presume was well known to the Congress, was intended to be maintained. Certainly it would not be sensible to require Congress to say, "For purposes of this chapter, *and we mean everything in this chapter* . . .," in order to ensure that it has covered everything in a chapter of the statutes.

The issue, then, is not whether the prior cases, including Supreme Court cases, determined that under different statutory language Congress' intent was that § 1400(b) stood alone. The issue is, what, as a matter of first impression, should we conclude the Congress *now* intends by this new language in the venue act.

It is axiomatic that statutory interpretation begins with the language of the statute. *Mallard v. U.S. Dist. Court For S. Dist. of Iowa*, ____ U.S. ____, 109 S.Ct. 1814, 1818 (1989); *UNR Indus., Inc. v. United States*, ____ F.2d ____, Nos. 89-1638, -1639, slip op. at 11 (Fed. Cir. Jul. 30, 1990). If, in a given case, the words of the statute do not provide an answer, then a court has no choice but to fill in the interstices. *See UNR*. If, on the other hand, the language is clear and fits the case, the plain meaning of the statute will be regarded as conclusive. *See Sullivan v. Stroop*, ____ U.S. ____, 110 S.Ct. 2499, 2502 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Bethesda Hospital Assoc. v. Bowen*, 485 U.S. 399, 403 (1988).

There of course may be those rare occasions under highly unusual circumstances when a court must conclude that the words used by the Congress did not capture the Congressional intent, at least as applied to the case before it. Such a case might be found when there is clearly expressed legislative intent that, on the given facts, a contrary result was intended, *United States v. Turkette*, 452 U.S. 576, 590 (1981), or when a literal application of the statute produces a result so unlikely that Congress could not have intended it. *United States v. Ron Pair Enters., Inc.*, ____U.S. ____, ____, 109 S.Ct. 1026, 1031 (1989).

In the case before us, the language of the statute is clear and its meaning is unambiguous. Absent extraordinary circumstances, our inquiry must end here. *Ron Pair Enters.*, ____ U.S. at ____, 109 S.Ct. at 1030 (where statute's language is plain, the court's sole function is to enforce it according to its terms — the words express Congress' intent and so reference to legislative history is unnecessary). Section 1391(c) applies to all of chapter 87 of title 28, and thus to § 1400(b), as expressed by the words "For purposes of venue under this chapter." There can be no mistake about that.

It is true that § 1391(c) is a general venue statute and that § 1400(b) is a specific one. But the general rule that a specific statute is not controlled or nullified by a general statute regardless of priority of enactment, absent a clear intention otherwise,[16] does not govern the present situation. This is for two reasons. First, in this case the general statute, § 1391(c), expressly reads itself into the specific statute, § 1400(b). Second, § 1391(c) only operates to define a term in § 1400(b) — it neither alone governs patent venue nor establishes a patent venue rule separate and apart from that provided under § 1400(b). Nor does it conflict with § 1400(b).[17] Furthermore, even were the rule applicable to the issue at hand, the language of the statute would reveal "a clear intention" that § 1391(c) is to supplement § 1400(b).

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[16]See, *e.g.*, *Morton v. Mancari* 417 U.S. 535, 550-51 (1974) (a general provision in Title 42 does not impliedly repeal specific provisions in Title 25); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976) (venue is controlled by a narrow provision in Title 12, not by a broad provision in Title 15).

[17]It can be argued that by reading § 1391(c) into § 1400(b), the second test under § 1400(b) becomes superfluous and thus meaningless. For, wherever a corporate defendant commits acts of infringement and has a regular and established place of business, it will necessarily be subject to personal jurisdictoin there. However, this argument overlooks that § 1400(b) applies to *all* defendants, not just corporate defendants, and this the second test for venue remains operative with respect to defendants that are not corporations.

IV

Congress has not clearly expressed that its intent is contrary to the words of the statute. The legislative history of the 1988 amendment reveals *no* legislative intent, let alone clearly expressed intent, contrary to the plain meaning of this first sentence of the amended statute. It is the second sentence to which the legislative history is addressed. that sentence concerns the question of where venue lies in a multidistrict state. As the commentary on the 1988 revision notes:

> It was that [problem] which Congress, citing a Judicial Conference recommendation, sought to eliminate with the second sentence of the new subdivision (c) . . . .
>
> In making the change, however, Congress recast the provision in its entirety, expanding venue choices with the generous standard embodied in the first sentence of the new subdivision (c) and perhaps producing some open questions in the course of doing so . . . .

Siegel, *Commentary on 1988 Revision,* 28 U.S.C.A., Ch. 87, at 3 (1990 Supp.).

The official legislative history on this amendment, in its relevant entirety, is reprinted in the margin.[18] While the legislative

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[18]Venue generally turns on one of two considerations: the place where the claim arose or the residence of the parties. When one or more of the parties is a corporation, venue problems arise in determining a corporation's "residence." The [old] general venue statute defines the residence of a corporation as "any judicial district in which it is incorporated or licensed to do business or is doing business." 28 U.S.C. § 1391(c). Read literally, the statute appears to make venue proper in *any* district in a multidistrict state in which a corporation is incorporated, licensed to do business, or doing business.

The Committee concluded that a corporation for venue purposes should be deemed to reside in any judicial district in which it was subject to personal jurisdiction at the time the action was commenced. In multidistrict states in which a corporation is not incorporated or licensed to do business, the venue determination should be made with reference to the particular district in which a corporation is sued. Thus,

history reveals that a purpose of the amendment is to define venue of corporate defendants and to prescribe the venue determination in multidistrict states, it does not speak to how or whether this amendment is intended to affect § 1400(b), or for that matter other sections of chapter 87. Congress' silence on this issue does not support a negative inference that the 1988 amendment was not intended to affect § 1400(b). *See Turkette*, 452 U.S. at 591 (that the legislative history forcefully supports a major purpose of the statute, but does not address the statute's scope regarding the issue at hand, does not require the negative inference that the statute does not also have the purpose, and thus scope, in question). Congress' intention is simply not known. "Ordinarily, 'Congress' silence is just that — silence.' " *Community For Creative Non-Violence v. Reid*, ___U.S. ___, 109 S.Ct. 2166, 2177 (1989) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)).

That there may be no specific legislative history regarding the amendment's effect on § 1400(b) does not modify this court's duty to employ the plain meaning of the language that the Congress adopted. *United States v. Bornstein*, 423 U.S. 303, 310 (1976). The Supreme Court has stated that "deference to the supremacy of the Legislative, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [courts] to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)); *see also Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984).

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for example, a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California) unless, of course, venue lies there for other reasons. This amendment would accomplish this purpose.

H.R. Rep. No. 100-889, 100th Cong., 2d Sess. 7 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 6031 (emphasis in original).

It can be presumed that Congress is knowledgeable about existing law pertinent to legislation it enacts, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). This rule of statutory construction does not cut in favor of maintaining the independence of the two sections. Other than by the clear language of the statute, Congress has not given any indication of whether it intended to change the scope of venue under § 1400(b). If we can infer anything from Congress' knowledge of the prior judicial interpretation of § 1400(b), given the clear language of the statute, it would be that Congress *did* intend to change the scope of venue under § 1400(b). *Cf. Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (where Congress enacts a new law incorporating sections of prior law, it is presumed that Congress had knowledge of the interpretation given to the incorporated law as it relates to the new statute).

In urging the Senate to pass the Judicial Improvements and Access to Justice Act, Senator Heflin, Chairman, Subcommittee on Courts and Administrative Practice, with regard to a group of proposed provisions, including the § 1391(c) amendment, stated:

> Title X consists of 23 miscellaneous provisions to improve the administration of justice. Most come from specific recommendations of the Judicial Conference as developed over the past several years as problems surface. The source and merits of the various provisions are discussed in the section-by-section analysis.
>
> *This bill represents numerous hours of negotiation and compromise.*

134 Cong. Rec. S16294, 16297-298 (daily ed. Oct. 14, 1988) (emphasis added). In reaching the same conclusion we reach today, the District Court in *Century Wrecker Corp. v. Vulcan Equip. Co.*, 733 F. Supp. 1170, at 1173, 13 USPQ2d 1715, at 1717-18 (E.D. Tenn. 1989), stated:

> As early as December 1985 the proposed redraft of § 1391(c) included the language "[f]or purposes of venue under this chapter...." Report of the Subcommittee on Federal Jurisdiction to the Committee on Court Administration, P.11 (December 1985). Significantly, that language

> had not been changed after almost two years of further consideration of changes regarding § 1391(c). Report of the Judicial Conference Committee on Court Administration (September 1987). Finally, in 1988 Congress adopted the changes recommended by the Judicial Conference in 1985. Therefore, the Court must conclude Congress intended that § 1391(c) be applied to each and every venue provision found in Chapter 87.

The Supreme Court has stated that "[s]trict adherence to the language and structure of [an] Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises." *Community for Creative Non-Violence*, ____ U.S. at ____, 109 S.Ct. at 2177, n.14.

This conclusion is reinforced by the fact that the drafters of the language incorporated in the 1988 amendment recognized the problem. Professor Edward H. Cooper, the reporter for the Judicial Conference subcommittee which prepared the Conference's recommendation adopted by the Congress, wrote in a December 4, 1986 memorandum to the subcommittee explaining the proposed revision:

> "The [new] definition of corporate residence in § 1391(c) now provides a basis for applying the substantial number of venue statutes enacted as part of various substantive federal laws. *As a matter of caution, the proposal limits its definition of residence to the venue provisions gathered in Chapter 87 of the Judicial Code, 28 U.S.C. §§ 1391 through 1412.*" (Emphasis added.)

Reprinted in 39 Patent, Trademark & Copyright Journal 435, 438 (March 29, 1990).

V.

A further test of our reading of the 1988 amendment to § 1391(c) is to examine whether the impact of our reading is so unlikely that Congress simply could not have intended it. The answer to that query requires a sense of the history of Congress' treatment of venue in patent infringement cases. There is some dispute about whether the Congress intended to liberalize or

restrict venue in patent cases by its enactment of that first particular venue provision in 1897. *Compare* Wydick, *Venue in Actions for Patent Infringement*, 25 Stanford L. Rev. 551, 557-58 (1973) (Congress intended to broaden venue from the restrictive 1887 Act), *with* Waldrop, *The Patent Venue Statute, 28 U.S.C. § 1400(b) Should Not Be Repealed*, 4 A.P.L.A. Q.J. 32, 36 (1976) (Congress intended to restrict venue in light of the existing court constructions). One's view of that issue depends on how one reads the state of general venue law following the amendments of 1887, Act of March 3, 1887, c.373, 24 Stat. 552, which substantially narrowed the general law governing plaintiffs' venue options compared to the pre-existing law.

The lower federal courts were in considerable disagreement as to whether the Act of 1887 applied to patent infringement litigation. If it did, the 1897 Act ten years later liberalized patent venue; if the earlier act did not apply, the 1897 Act restricted it. As the Supreme Court in *Brunette*, 406 U.S. at 712, put it: "[The Act of 1897] was of course more restrictive than the law as it was left by *Hohorst* [*In re Hohorst*, 150 U.S. 653 (1893)], but it was rather less restrictive than the general venue provision then applicable to claims arising under federal law." The Supreme Court, in *Stonite*, 315 U.S. 561, adopted the restrictive intent theory, and that dictated *Fourco*, 353 U.S. 222.

What is not in dispute is that the narrowing of general venue which Congress incorporated into the 1887 Act has long since been superseded by more liberalized venue law, so that the 'freezing' of patent venue as a result of *Fourco* has made patent venue an anomaly. Justice White, writing for the Court in *Brunette*, 406 U.S. at 713 n.13, noted: "Ironically, changes in the general venue law have left the patent venue statute far behind. Since 1948, the general venue law has authorized suit against a corporate defendant not only where he maintains a 'regular and established place of business,' as in § 1400(b), but also where he is 'doing business.' 62 Stat. 935, now § 1391(c). And since 1966, the general venue law has authorized suit where 'the claim

arose'. . . ." Of course, the irony is particularly poignant since it is the consequence of the Court's own rulings.[19]

Now, under amended § 1391(c) as we here apply it, venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced. While this test is narrower than allowing venue wherever a corporate defendant could be served, it is somewhat broader than that encompassed by the previous standard of "place of incorporation."[20]

This new venue rule we discern from the express words of the Congress is neither illogical nor unfair. Authorities have long argued that venue in patent infringement actions should be no different than in other civil cases:

> With the enactment of liberalized general venue laws, the patent venue statute has long since outlived its original purpose.
>
> The continued existence of the patent venue statute serves only to prolong patent litigation and make it more expensive. . . .
>
> * * * *
>
> The best course would be for Congress simply to repeal the patent venue statute, leaving the general venue laws to govern actions for patent infringement. A similar conclusion

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[19]The Court's rulings have also made venue in patent cases a subject of considerable litigation, as plaintiffs and defendants have fought over where to sue. *See* Wydick, *supra*, at 566-85.

[20]"Because the personal jurisdiction question is no different for a patent case than any other type of case, suffice it to say that *International Shoe* and its progeny apply." Irani, *Jurisdiction and Venue in Patent Cases; Effect of the Federal Circuit on Construction of the Patent Venue Statute*, 69 J. Pat. Trademark Off. Soc'y 445, 446 (1987). At least until now, questions of personal jurisdiction rarely arose in simple patent infringement cases because the venue statute was, comparatively, severely more restrictive concerning the districts in which suit could be brought. *See* 5 D. Chisum, *Patents* § 21.02[3] at 96.3-97 (Feb. 1990).

> was reached by the American Law Institute's Study of the Division of Jurisdiction between State and Federal Courts. [ALI, Study of the Division of Jurisdiction Between State and Federal Courts 220-21 (1969).]

Wydick, *supra*, at 584-85. *Accord* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3823 at 215 (1990) ("The statute [§ 1400(b)] ought to be repealed, and patent cases treated in the same fashion as federal question cases generally.").

As far back as 1974, the A.B.A. Section of Patent, Trademark and Copyright Law supported a resolution that the term 'resides' in § 1400(b) be defined by § 1391(c). Gess, *Desirability of Initiating Patent Litigation Wherever the Defendant is Found*, 1974 A.B.A. Sec. Pat. Trademark and Copyright L. 114, 115 ("[T]he patent venue provision, 28 U.S.C. § 1400(b) and the interpretation given it by the Supreme Court in *Fourco* . . . is the result of historical accident. The consequence of this accident has been to create confusion in the courts and to unduly shield a corporate infringer.").

It has long been held that a declaratory judgment action alleging that a patent is invalid and not infringed — the mirror image of a suit for patent infringement — is governed by the general venue statutes, not by § 1400(b). *See, e.g., United States Aluminum Corp. v. Kawneer Co., Inc.*, 694 F.2d 193, 195, 216 USPQ 745, 746 (9th Cir. 1982). The result of applying § 1391(c) to patent infringement cases is to bring the law of venue in patent cases more in line with venue law generally, as well as with other types of patent litigation. This is not a result so absurd that Congress could not possibly have intended it.

VI.

Thus, the first test for venue under § 1400(b) with respect to a defendant that is a corporation, in light of the 1988 amendment to § 1391(c), is whether the defendant was subject to personal jurisdiction in the district of suit at the time the action was commenced. 28 U.S.C. §§ 1391(c) & 1400(b) (1988). Since Johnson has conceded that VE obtained personal jurisdiction over it in the Northern District of California, Brief for Appellee at 2

(filed June 6, 1990), Johnson "resides" in that district, within the meaning of the first test of § 1400(b), and venue properly lies in the Northern District of California. The District Court's determination that venue with regard to Johnson did not lie in the Northern District of California was error. Accordingly, the judgment of the district court in Appeal 90-1270 (*VE Holding I*) is affirmed[21]; in Appeal 90-1274 (*VE Holding II*) the judgment is reversed and the case is remanded for further proceedings.

VII.

Each party will bear their own costs for this appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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[21] *See supra* note 2.

APPENDIX B

C89-3856SC ENE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VE HOLDING CORP.,
a Nevada corporation,
Plaintiff,
v.
CALIFORNIA PELLET MILL COMPANY,
a California corporation, and
JOHNSON GAS APPLIANCE COMPANY,
an Iowa corporation,
Defendants.

ORDER RE MOTION TO DISMISS

In an order dated May 19, 1989 this court dismissed VE Holding Corporation's ("VE Holding") patent infringement action against Defendant Johnson Gas Appliance Company ("Johnson") on the ground that venue in the Northern District of California was improper under 28 U.S.C. § 1400(b). Subsequently, VE Holding refiled the same suit against Johnson in the Northern District of California and it was consolidated with the first action.[1] Johnson now moves this court to dismiss VE Holding's current action on the same ground. For the reaons articulated in the court's May 19, 1989 Order and the following reasoning, the court again dismisses VE Holding's action against Johnson.[2]

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[1]VE Holding's motivation in refiling was that it became clear after the court's May 19 Order was issued that on appeal the merits of the order would not have been reached because of a technicality involving the effective date of the 1988 amendments to 28 U.S.C. § 1391(c). Thus, to avoid a wasteful appeal VE Holding refiled the same action against Johnson so that the 1988 amendments could be the proper subject of appeal.

[2]Ordinarily, the doctrine of *res judicata* would preclude any reconsideration of this venue issue. *Agcaoili v. Gustafson,* 844 F.2d 620, 627 (9th Cir. 1988). Because, however, the first action was filed on January 24,

In *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222 (1956), the Supreme Court unequivocally held that 28 U.S.C. § 1400(b) is the sole and exclusive provision governing venue in patent infringement actions and that Congress did not intend to supplement it with section 1391(c), the general corporation venue statute. Section 1400(b) then and now reads: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place for business." A corporation is deemed to reside, for the purposes of section 1400(b), only in the state of incorporation. *Self v. Fisher Controls Co. Inc.*, 566 F.2d 62, 63 (9th Cir. 1977).

In 1956, section 1391(c) read: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, and *such judicial district shall be regarded as the residence of such corporation for venue purposes*" (emphasis added). Thus, in 1956 the Supreme Court held that section 1391(c)'s definition of "residence" for "venue purposes" did not apply to section 1400(b)'s definition of "resides."

VE Holding argues that amended section 1391(c) evinces Congress's intent that section 1391(c)'s definition of "reside" apply to every section in Chapter 87, including section 1400(b). Section 1391(c) after the 1988 amendments now reads in part: "*For purposes of venue under this chapter*, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced" (emphasis added). The court recognizes the merit of this argument; amended section 1400(b) states that its definition of "reside" is for "the purposes of venue under [Chapter 87]" and a literal interpretation against a fresh backdrop would demand that its definition of "reside" be applied to section 1400(b). This court, however, is not free to interpret sec-

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1989, before the effective date of the 1988 amendments to 28 U.S.C. § 1391(c), § 1391 (West Supp. 1989), this court's May 19, 1989 Order may not have *res judicata* effect. This is because the old section 1391(c) governed the first action, making the court's resolution of the venue issue premature. Accordingly, the court will address the venue issue anew.

tions 1391(c) and 1400(b) without considering binding precedent.

The *Fourco* Court was faced essentially with the same issue as this court is today. Granted, the old section 1391(c) was different than amended section 1391(c), but the old section 1391(c) used language just as general as amended section 1391(c). The Court unequivocally rejected supplementing section 1400(b) with the old section 1391(c) because, after reviewing the history of section 1400(b), the Court concluded that section 1400(b) was "the exclusive provision controlling venue in patent infringement proceedings." *Fourco* at 225.

Congress, of course, by amending a statute can negate the Supreme Court's prior interpretation of it, but there are rules of construction which a court should follow when discerning Congress's intent.

> [T]he legislature, in the enactment of a statute, will not be presumed to intend to overturn long-established legal principles, unless such intention is made clearly to appear by express declarations or by necessary implication. On the contrary, the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears .... Accordingly, every statute which is properly the subject of judicial construction should receive such interpretation as will not conflict with general principles."

73 Am. Jur. 2d *Statutes* § 181 (1974) (footnotes omitted). Nevertheless, "where a statute is plain and unambiguous, it is to be construed in conformity to its obvious meaning without regard to the previous state of the law." *Id.*

The difficulty of determining the effect of amended section 1391(c) on section 1400(b) is that although section 1391(c)'s clear language strongly suggests that its definition of "reside" should be applied to all of the venue provisions in Chapter 87, the Supreme Court in *Fourco* determined that the language of section 1391(c) was not determinative when interpreting section 1400(b).

> The question is not whether § 1391 is clear and general, but, rather, it is, pointedly, whether § 1391(c) supplements § 1400(b), or, in other words, whether the latter is complete, independent and alone controlling in its sphere . . . .
>
> We think it clear that § 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to *all* in a particular type of actions [sic], *i.e.*, patent infringement actions. In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'

Fourco at 228-29 (citations omitted). Thus, the *Fourco* Court's reasoning did not rest on the language of section 1391(c); its reasoning was based on the history and purpose of section 1400(b). *Fourco* at 225. Accordingly, unless it is obvious that Congress intended to overturn the *Fourco* Court's determination of section 1400(b)'s purpose, a lower court should not give too much weight to a change in the language of section 1391(c) when determining the scope of section 1400(b).

The published legislative history of the 1988 amendments does not demonstrate that Congress intended to change the historical exclusivity of section 1400(b); it is silent on the issue. It does demonstrate, however, that Congress amended section 1391(c) because under the old section venue was proper in any district in a multidistrict state and Congress wanted to limit venue to only those districts where a defendant had sufficient minimum contacts making it subject to personal jurisdiction.

> The committee concluded that a corporation for venue purposes should be deemed to reside in any judicial district in which it was subject to personal jurisdiction at the time the action was commenced. In multidistrict states in which a corporation is not incorporated or licensed to do business, the venue termination should be made with reference to the particular district in which a corporation is sued. Thus, for

> example, a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California) unless, of course, venue lies there for other reasons. This amendment would accomplish this purpose.

1988 U.S. Code, Cong. & Admn. News 5982, 6031. The legislative history manifests a concern wholly unrelated to altering the historical exclusivity of section 1400(b).

The "legislative history" to which VE Holding refers the court is inconclusive. It comprises two memoranda which suggest that Congress was aware that the 1988 amendments would widen the scope of section 1391(c). This argument is too tenuous for this court to find conclusively that Congress intended to change the scope of section 1400(b).

With no express declaration from Congress that it intended to change the historical exclusivity of section 1400(b), it does not plainly appear to this court that amended section 1391(c)'s definition of "reside" applies to section 1400(b). Despite amended 1391(c)'s language, it is clear from *Fourco* that section 1400(b) is a separate and distinct venue provision and, thus, that its definition of "resides" remains unchanged after the 1988 amendment to section 1391(c).

An additional reason for finding that Congress did not intend to modify section 1400(b) is that expanding the meaning of "resides" in section 1400(b) would render the second clause superfluous; any defendant "doing business" in a judicial district would be subject to personal jurisdiction. "[I]t is a cardinal rule of statutory construction that significance and effect should, if possible, without destroying the sense or effect of the law, be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." 73 Am. Jur. 2d *Statutes* § 250 (footnotes omitted). The only way all of section 1400(b) can be given meaning is by maintaining its exclusivity in patent infringement actions.

In accordance with the foregoing, it is hereby ORDERED that Defendant Johnson's motion to dismiss for lack of proper venue be GRANTED.[3]

IT IS SO ORDERED.

Dated: February 9, 1990.

/s/ SAMUEL CONTI
United States District Judge

[3]The court declines to enter a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for the May 19, 1989 Order.

APPENDIX C

No. C 89 0209 SC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VE HOLDING CORP.,
a Nevada corporation,
Plaintiff,
v.
CALIFORNIA PELLET MILL COMPANY,
a California corporation, and
JOHNSON GAS APPLIANCE COMPANY,
an Iowa corporation,
Defendants.

ORDER

Defendant, Johnson Gas Appliance Company ("Johnson"), moves this Court pursuant to Fed. R. Civ. P. 12(b)(3) for dismissal for lack of venue in the Northern District of California. Johnson asserts that plaintiff, VE Holding Company ("VE"), improperly sued it, in that venue does not properly lie in this district pursuant to 28 U.S.C. § 1400(b).

28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 229 (1957). The provision states that:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

28 U.S.C. § 1400(b). Johnson maintains that neither venue requirement is satisfied, and therefore venue in the Northern District of California is improper; VE claims that both elements of § 1400(b) are satisfied, making venue proper. For the reasons that follow, the Court finds that venue is not proper in this district and that the action must be dismissed with respect to defendant Johnson.

Johnson is an Iowa corporation, whose principal place of business is in Cedar Rapids, Iowa. VE has sued defendant California Pellet Mill Company ("CPM") for direct infringement of certain patents owned by VE, and has sued Johnson for inducing CPM's infringement.

The burden of establishing proper venue lies with the plaintiff. Plaintiff argues that Johnson "resides" in this district by arguing that the Judicial Improvements and Access to Justice Act, enacted November 19, 1988, which amended 28 U.S.C. § 1391(c), also amended and broadened the patent venue provision, 28 U.S.C. § 1400(b). § 1391(c) is the general corporate venue provision, and the Judicial Improvements and Access to Justice Act amended that section to state that "for purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction . . ." VE argues that § 1391(c) supplements the patent venue provision of § 1400(b), and that therefore Congress' 1988 amendments to § 1391(c) apply to questions of venue arising in a patent law case.

The Supreme Court squarely addressed this issue over thirty years ago, and unequivocally rejected VE's position. *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957). In *Fourco*, the Court was presented with the exact argument that plaintiff makes here, *viz.*, that "§ 1391(c) . . . includes patent infringement actions . . . and therefore, that the statute should be read with, and as supplementing, § 1400(b) in patent infringement actions." 353 U.S. at 228. The Supreme Court declined to follow this reasoning, holding that because § 1391(c) "is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable specifically to . . . patent infringement actions, . . . [the] specific terms prevail over the general in the same or another statute which otherwise might be controlling . . . . [28 U.S.C. § 1400(b)] is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." 353 U.S. at 228-229. In reaching this conclusion, the Court relied on prior caselaw interpreting the patent venue provision, and also on Congressional intent in passing both § 1391(c) and § 1400(b). Plaintiff has submitted nothing to support its conclusion that Congress, in amending

§ 1391(c) in 1988, intended the courts to alter their longstanding interpretation that that section does not supplement the provision concerning patent venue.

A corporation is deemed to reside, for purposes of § 1400(b), only in its state of incorporation. *Self v. Fisher Controls Co. Inc.*, 566 F.2d 62, 63 (9th Cir. 1977). Since Johnson is incorporated in Iowa, plaintiff cannot claim proper venue under the "residence" portion of the statute, and must therefore establish venue under the second prong of § 1400(b): VE must show that Johnson has committed acts of infringement and has a regular and established place of business in this district.

The parties contest whether Johnson has a "regular and established place of business" in this district. Johnson argues that it "neither owns, leases, nor rents any real property in the State of California, [nor does it] maintain a place of business of any kind in the State of California, nor does it have a telephone listing in the State of California. Further, Johnson Gas neither has nor maintains any employees residing in the State of California. All orders submitted by residents of California are processed and accepted in Cedar Rapids, Iowa." Johnson's Memorandum in Support of Motion to Dismiss, at 2. VE argues that Johnson has a "regular and established place of business" in this district because Johnson has customers in the district and because Johnson solicits business in the district.[1]

Venue under § 1400(b) is "not to be given a liberal construction," and "it does not suffice that [a company] is licensed to do business in [this State] or that it may be 'doing business' in [this district.]" *Dual Manufacturing & Engineering v. Burris Industries*, 531 F.2d 1382, 1385 (6th Cir. 1976); *Phillips v. Baker*, 121 F.2d 752, 755 (9th Cir. 1941). The Federal Circuit has held that

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[1]VE also states in its brief that "continuing maintenance and service support is provided by Johnson to its multiple customers" in this district. Plaintiff's Memorandum in Opposition to Motion to Dismiss, at 8. However, VE has offered no evidence substantiating this claim, although VE was granted an extension of time in which to oppose Johnson's motion so that VE could depose Johnson officials to establish the basis for venue in this Court.

§ 1400(b) is met where a corporate defendant does its business in that district through a "permanent and continuous presence" there. *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985). The *Cordis* Court found this requirement satisfied where the defendant employed two full-time sales representatives in the district, these representatives worked exclusively for the defendant, they maintained offices in their homes in the district, there was a local phone number for the defendant corporation in the district, orders for defendant's product could be placed in the district, and defendant's representatives played a significant role in the use and implementation of defendant's products in the district. The Ninth Circuit has found the requirement not satisfied where a defendant's presence in the district can best be described as "temporary." *Phillips*, 121 F.2d at 756. The Court in *Schoofs v. Union Carbide Corp.*, 633 F. Supp. 4 (E.D. Cal. 1985), citing *Cordis*, held that venue was not proper in that district under § 1400(b), where the defendant employed only one full-time salesperson in the district, who did not maintain an office in his home in the district, and did not maintain a local phone number for the business. 633 F. Supp. at 6.

The Court finds that because Johnson has no place of business in this district, because its two sales representatives are not solely employed by Johnson but instead represent other manufacturers as well, because no Johnson employees maintain home offices in this district, and because there is no telephone listing for Johnson in this district, Johnson's presence is at best "temporary," and therefore with respect to Johnson, venue is not proper in this district pursuant to 28 U.S.C. § 1400(b).

In accordance with the foregoing, it is hereby ordered that defendant Johnson is DISMISSED from this action for improper venue.

SO ORDERED.

Dated: May 19, 1989

/s/ SAMUEL CONTI

United States District Judge

Appendix D

Court Reform and Access To Justice Act

Hearings
Before the
Subcommittee on Courts, Civil Liberties,
and the Administration of Juistice

of the

Committee on the Judiciary House of Representatives
One Hundredth Congress
First and Second Sessions

on

H.R. 3152
Court Reform and Access to Justice Act

September 23, October 14, 1987, and February 24, 1988

Part 2

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2. From the Judicial Conference of the United States

Supreme Court of the United States
Washington, D.C. 20543

Chambers of the Chief Justice

September 13, 1988

Honorable Robert W. Kastenmeier
Chairman, Subcommitte on Courts, Civil
Liberties and the Administration of Justice
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515-6219

Dear Mr. Chairman:

As Chairman of the judicial Conference of the United States, I write to express both the Conference's and my personal support for H.B. 4807. This bill represents the most significant legislation affecting the Federal courts since the early part of the decade. It represents a compilation both of ideas you have developed and others which have been transmitted to Congress by the Judicial Conference. Its passage will have a substantially beneficial impact on the administration of the courts.

Earlier this year, the Congress adopted S. 952, a bill eliminating the mandatory jurisdiction of the Supreme Court. Passage of that bill was welcomed by the Court and will have far-ranging benefits to the way we conduct our business. In like fashion, passage of the Court Reform and Access to Justice Act will also have a most positive impact on the other entities that make up the Judicial Branch.

We appreciate your efforts and those of your colleagues in taking the time and effort to develop and support this legislation.

Sincerely,
William H. Rehnquist

secure "just, speedy and inexpensive determination of every action."[4] The subcommittee also learned that the Federal judiciary is beset by problems in all three of these areas: delay caused by rising caseloads and insufficient support services; spiraling costs caused by litigation expenses and attorney's fees; and unfair and inconsistent decision caused by the pressures placed on judges who must cope with the torrent of litigation.

During the past decade, the Subcommittee has been instrumental in processing a number of proposals through the legislative branch to the President's desk for signature. Among the important proposals enacted into law during the 95th through 99th Congresses are the following: improvements relating to jurors and witnesses[5]; expansion and clarification of magistrates' jurisdiction[6]; division of the Fifth Circuit into two autonomous circuits[7]; the Dispute Resolution Act[8]; judicial discipline and circuit council reform[9]; merger of the Court of Claims and Court of Customs and Patent Appeals into the Court of Appeals for the Federal Circuit[10]; creation of a State Justice Institute[11]; elimination of statutory civil priorities[12]; and judicial survivors' annuities reform.[13]

Nonetheless, in order to maintain pace with societal and technological changes that are translated into constant and growing judicial workloads, more needs to be done.

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[4] FED.R.CIV p. 1 *see also* FED.R.CRIM. p. 2

[5] Public Law No 95-535, 92 Stat. 2033. Public Law No. 95-572, 92 Stat. 2453.

[6] Public Law No. 96-82, 93 Stat. 643.

[7] Public Law No. 96-452, 94 Stat. 1994.

[8] Public Law No. 96-190, 93 Stat. 643.

[9] Public Law No. 96-458, 94 Stat. 2053.

[10] Public Law No. 97-164, 96 Stat. 25.

[11] Public Law No. 98-620, 98 Stat. 3356.

[12] *Id.* at 3356.

[13] Public Law No. 96-336, 100 Stat. 633.

In order to identify judicial branch problems, the subcommittee has exercised its oversight authority. For example, the subcommittee has held hearings on the Federal Judicial Center[14] the Administrative Office of U.S. Courts,[15] the Judicial Conference of the United States,[16] and the State Justice Institute.[17]

The subcommittee also has held legislative hearings on a number of proposals that, to date, have not been enacted into law: reform of the Federal rulemaking process;[18] diversity of citizenship jurisdicition;[19] and court-annexed arbritration.[20]

100th Congress. On August 6, 1987, subcommittee Chairman Robert Kastenmeier introduced H.R. 3152—the Court Reform

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[14] *See* Hearing on Federal Judicial Center Before the Subcomm. on Courts. Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong, 1st Sess. 1985. *see also* Hearing on Federal Judicial Center, State Justice Institute Before the Subcomm. on Courts. Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary. 100th Cong. 1st Sess. 1987 [hereinafter referred to as Hearing on Federal Judicial Center State Justice Institute].

[15] *See* Hearing on Federal Judicial Branch Before the Subcomm. on Courts. Civil Liberties and the Administration of Justice of the House Comm. on the judiciary, 97th Cong. 1st Sess 1981.

[16] *Id.*

[17] *See* Hearing on Federal Judicial Center/State Justice Institute. 100th Cong. *supra* note 14.

[18] *See* Hearings on the Rules Enabling Act Before the Subcomm. on Courts. Civil Liberties and the Administration

[19] *See* Hearing on Diversity of Citizenship Jurisdiction —1982. Before the Subcomm. on Courts. Civil Liberties and the administration of Justice of the House Comm. on the Judiciary. 97th Cong. 2d Sess. (1982) [hereinafter referred to as Hearing on Divresity of Citizenship Jurisdiction, 97th Cong.)

[20] *See* Hearing on Court Annexed Arbitration and Experimentation Before the Subcomm. on Courts. Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong. 1st Sess. (1987) [hereinafter referred to as Hearings on Arbitration].

and access to Justice Act of 1987. The major bill consisted of nine titles on numerous discrete matters of interest to the Federal judiciary. Some of the provisions had been the subject of previous congressional hearings and consideration; in addition, a few, such as title I concerning mandatory jurisdiction of the Supreme Court, were ultimately deemed appropriate for separate processing. The package, however, provided a focus for three days of hearings held over the next nine months by a Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

On September 23, 1987, testimony was received from the Judicial Conference of the United States (Honorable Elmo Hunter) and the American Bar Association (President Robert MacCrate). On October 14, 1987, testimony was presented by the Department of Justice (Honorable Stephen J. Markman), Professor Thomas D. Rowe (School of Law, Duke University) and Mr. Richardson Preyer (President, Private Adjudication Center, an affiliate of the Duke University School of Law). On February 24, 1988, the subcommittees concluded its hearing and heard from a panel of two Federal judges (Honorable Abner J. Mikva and Honorable Patrick Higginbotham) and Professor Laura Macklin (School of Law, Georgetown University.)

On May 12, 1988, the Subcommittee ordered H.R. 3152 reported with an amendment in the nature of a substitute. The bill as amended was subsequently introduced as a clean bill, H.R. 4807, and became a measure pending before the full House Committee on the Judiciary. This proposed legislation consisted of ten titles drawing primarily on the original proposals in H.R. 3152, but also on recommendations proffered in the course of the hearings. These titles dealt with Rules Enabling Act Legislation (title), arbitration (title II), Federal multiparty multiforum jurisdiction (title III, sub title A), diversity jurisdiction (title III, subtitle B), Federal Judicial Center amendments (title IV), elimination of the Temporary Emergency Court of Appeals (title V), jurisdiction of the Federal Circuit (title VII), State Justice Institute amendments (title VII), court interpreter amendments (title VIII), jury selection and service amendments (title IX), and some fifteen separate miscellaneous provisions (title X). The most controversial change made by the Subcommittee was to

eliminate virtually all of the Federal court jurisdiction based on the citizenship of the parties. With this exception, H.R. 4807 as reported by the Subcommittee was considered a non-controversial consensus bill.

On August 2, 1988, the full Committee on the Judiciary considered H.R. 4807. A number of amendments were adopted. Most importantly, the proposal to eliminate diversity of citizenship jurisdic-

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Section 1007—Corporate Venue

The Judicial Conference has recommended that 28 U.S.C 1391(c) be amended to read as follows:

> For purposes of venue under this chapter, a corporate defendant shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a state having more than one judicial district, a corporation shall be deemed to reside in any district, within which its contracts would be sufficient to subject it to personal jurisdiction if that district were a separate state, and if there is no such district the corporation shall be deemed to reside in the district within which it has the most significant contacts.

Venue generally turns on one of two considerations: the place where the claim arose or the residence of the parties. When one or more of the parties is a corporation, venue problems arise in determining a corporation's "residence." the general venue statute defies the residence of a corporation as "any judicial district in which it is incorporated or licensed to do business or is doing business". 28 U.S.C. 1391(c). Read literally, the statute appears to make venue proper in *any* district in a multidistrict state in which a corporation is incorporated, licensed to do business, or doing business.

The Committee concluded that a corporation for venue purposes should be deemed to reside in any judicial district in which it was subject to personal jurisdiction at the time the action was

commenced. In multidistrict states in which a corporation is not incorporated or licensed to do business, the venue determination should be made with reference to the particular district in which a corporation is sued. Thus, for example, a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California) unless, of course, venue lies there for other reasons. This amendment would accomplish this purpose.

Section 1008—Method fo Court Reporting

Under current 28 U.S.C. 636(c)(7) the litigants are allowed to impose upon the court the method by which the court record will be taken before a magistrate. This provision applicable to magistrates is amended to parallel provisions applicable to judges that reserve to the judge to determine the method for reording the court's proceedings. It is simply bad policy to permit a party to force a magistrate to use, for example, shorthand reporting when he or she might wish to use another method in order to manage the court business more expeditiously.

Section 1009—Removal Procedure Amendments

All of the proposed amendments in this section relate to removal jurisdiction. The amendments would, among other things, allow the citizenship of fictitious or "Doe" defendants to be disregarded for removal purposes; simplify the "pleading" requirement for removal; establish a one-year limit on removal based on diversity jurisdiction; eliminate the bond requirement on removal procedure; and regulated the joinder of additional parties after removal.